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No. 03-693

Supreme Court, U.S.
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In The
Supreme Court of the United States

SCOTTSDALE UNIFIED SCHOOL DISTRICT NO. 48, *et al.*,

Petitioners,

v.

JOSEPH J. HILLS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

W. SCOTT BALES
Counsel of Record

MARY ELLEN SIMONSON
ROBERT G. SCHAFFER
KIMBERLY A. DEMARCHI
LEWIS AND ROCA LLP
40 North Central Avenue
Phoenix, Arizona 85004
(602) 262-5311

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

REASONS FOR GRANTING WRIT

In his opposing brief, respondent mischaracterizes a key portion of the Ninth Circuit's holding as dicta and misconstrues this Court's opinion in *Good News Club*. While there should be no doubt on either interpretation, respondent's confused analysis of both opinions and the critical First Amendment issues they present, is precisely the reason why this Court's clarification is required for not only Scottsdale Unified School District, but all public schools. The Ninth Circuit's decision squarely presents the question reserved by this Court in the *Good News Club* case: whether viewpoint-based discrimination necessary to avoid an Establishment Clause violation is constitutionally permissible. As the Ninth Circuit's decision now stands, it requires the kind of entanglement with religion that this Court has held the State must avoid.

Contrary to respondent's characterization of the issue as "dicta," the Ninth Circuit expressly acknowledged and held that the District was not required to distribute respondent Hills' actual brochure. With its religious proselytizing language, it *both* fell outside the scope of a limited purpose public forum for the distribution of event and activity announcements *and* would pose potential Establishment Clause problems if it were distributed in a public school, by public school teachers, to elementary age children.

> We do not, however, mean to suggest that the District must distribute Hills's brochure as it was originally proposed. . . . However, because the District has created only a limited public forum, it could still exercise some control over the content of Hills's brochure, to the extent that

some of the language in the proposed brochure exceeds the scope of the District's forum.

For example, Hills's brochure contained the language "Did you know that if a child does not come to the knowledge of JESUS CHRIST, and learn the importance of Bible reading by age 12, chances are slim that they ever will in this life? We think it is important to start as young as possible!" This language was promotional *not only of the class but of religion*, and went beyond a description of the organization's general religious mission to directly exhort the reader to involve children in religious observance. We stated in *Prince* that the World Changers Club could announce its meetings using the school's facilities but could not in so doing "pray and proselytize." Likewise, the District is not obligated to distribute material that, in the guise of announcing an event, contains direct exhortations to religious observance; this exceeds the purpose of the forum the District created. [FN 6: This particular language might also present Establishment Clause concerns; however, because we do not need to address the specific content of Hills's brochure to determine that viewpoint discrimination occurred, we do not reach that question.] Exclusion of such material would not be based on viewpoint, but on subject matter. In other words, the District cannot refuse to distribute literature advertising a program with underlying religious content where it distributes quite similar literature for secular summer camps, *but it can refuse to distribute literature that* itself *contains proselytizing language.* The difference is subtle, but important.

(App. 15-16 (emphasis added)). Unfortunately, the subtlety of this standard will lead school districts and other public entities down the road of government entanglement with religion that is prohibited by the Establishment Clause. And, it will lead to the type of misinterpretation that respondent's brief foreshadows – the mistaken belief that because the above is merely dicta, that the Hills brochure now can be distributed even with its proselytizing language included – a result that would brazenly ignore the Ninth Circuit's holding and foster new litigation.

More disturbing is respondent's theory that the opinion requires the District to distribute a flier – presumably Hills' flier – that contains the "proselytization" of religious ideas and religious actions, and that such "advocacy" speech is constitutionally permissible (Br. 10-11). Neither the Ninth Circuit opinion nor the *Good News Club* opinion said any such thing.

The Ninth Circuit noted that, because of its other holdings, it did not need to reach the question whether distribution of a flyer like Hills's flyer would violate the Establishment Clause. However, schools in the District's position do not have that luxury. They face instead the prospect that they must review every community flier they receive to monitor the "subtle" distinction between language that promotes the advertised event and language that promotes something else, like religious beliefs.

Hills argues in his brief in opposition (Br. 8) that speech advocating participation in the advertised event is common in submitted brochures, and may indeed be an essential part of a forum to advertise activities of interest to school-age children. Not so. The Ninth Circuit recognized that "the school's forum was never opened for pure

discourse." (App. 15). Even so, the opinion is clear that speech that *proselytizes* cannot be permitted consistent with the First Amendment, particularly in a setting where the speech is in the form of fliers that are given by public school teachers, during class time, to small children with an admonition that they carry the fliers home to their parents for review. The Ninth Circuit's decision thus forces the District to either close its forum entirely or to appoint itself a religious editor, scrutinizing submitted fliers and excising proselytizing language.

Ominously, respondent implies that more litigation is ahead for the District if it retains a policy that excludes proselytizing (Br. 10). In other words, if the District does exactly what the Ninth Circuit opinion says it can and must do – avoid religious proselytizing and religious advocacy speech in its forum – the respondent interprets the opinion, and apparently the *Good News Club* opinion, to not reach this important issue and therefore to leave this District and others vulnerable to continued litigation on the point (Br. 9-10). This is yet another critical reason why this Court must assist the District and all public schools in clarifying these issues.

CONCLUSION

Accordingly, the Ninth Circuit's decision requires the kind of entanglement with religion that this Court has held the State must avoid, and squarely presents the question reserved by this Court in the *Good News Club* case – whether viewpoint-based discrimination necessary

to avoid an Establishment Clause violation is constitutionally permissible. The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 29th day of December, 2003.

W. SCOTT BALES
Counsel of Record

MARY ELLEN SIMONSON
ROBERT G. SCHAFFER
KIMBERLY A. DEMARCHI
LEWIS AND ROCA LLP
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Phoenix, Arizona 85004
(602) 262-5311

Counsel for Petitioners